Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-761

HARRY HUNTER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The Respondent respectfully prays that the Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA seeking review of a decision of the Supreme Court of the State of North Carolina entered on September 1, 1976, be denied.

CITATION TO OPINION BELOW

The Petitioner was tried on two separate indictments charging him with first degree murder and with armed robbery or attempted robbery. The trial court submitted to the jury only the issue of the defendant's guilt as to being an accessory before the fact to a murder committed in the perpetration of an attempt to commit robbery with a firearm. The jury returned a verdict of guilty, and a sentence of life imprisonment

was imposed. The Supreme Court of North Carolina affirmed the judgment. 290 N.C. 556.

JURISDICTION

The Respondent does not object to the statement of jurisdiction in the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of North Carolina.

QUESTION PRESENTED

DOES A DEFENDANT WHO IS BEING TRIED IN A CRIMINAL ACTION IN ONE STATE, THOUGH HE BE A RESIDENT OF ANOTHER STATE, HAVE AN AUTOMATIC CONSTITUTIONAL RIGHT TO BE REPRESENTED IN THE CRIMINAL ACTION BY AN ATTORNEY FROM HIS STATE OF RESIDENCE, EVEN THOUGH THE DEFENDANT IS ALREADY REPRESENTED BY ONE ATTORNEY FROM HIS STATE OF RESIDENCE AS WELL AS AN ATTORNEY FROM THE STATE IN WHICH THE CRIMINAL ACTION IS BEING CONDUCTED?

CONSTITUTIONAL PROVISIONS, STATUTES, AND CANONS OF ETHICS INVOLVED

The Respondent does not object to any of the above provisions which are included in the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of North Carolina.

STATEMENT OF CASE

This was a criminal action in which the defendant, Harry Hunter, was indicted on two separate indictments of first degree murder and with armed robbery or attempted robbery of the murder victim. The case was tried before the Honorable Julius A. Rousseau, Superior Court Judge, at the August 18, 1975 Criminal Session of Union County Superior Court.

The trial court submitted to the jury only the question of guilt of the defendant as an accessory before the fact of

murder, and from a verdict of guilty, a sentence of life imprisonment was imposed. The Supreme Court of North Carolina affirmed the judgment below on September 1, 1976.

STATEMENT OF FACTS

The Respondent adopts as its own, as if fully set out herein, the facts as stated by the North Carolina Supreme Court in its opinion in *State v. Hunter*, 290 N.C. 556 (1976).

Inasmuch as the primary reason for the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of North Carolina deals with the question of the Petitioner's legal representation, and since the facts surrounding that representation are not set out in the North Carolina Supreme Court's statement of facts, the Respondent herein sets out those facts in addition to the actual facts of the case as enunciated by the North Carolina Supreme Court.

On May 5, 1975, Mr. James M. Long, an attorney from South Carolina, apparently was retained by the Petitioner, after having been told by the District Attorney of Union County that a bill of indictment had been returned against the Petitioner in Union County. Mr. Ralph Stroman, an attorney in South Carolina who normally handles the Petitioner's business affairs, had also been retained by the Petitioner, some days prior to May 5, 1975. Mr. James Griffin, an attorney in Union County, North Carolina, was retained by the Petitioner on June 1, 1975.

On August 18, 1975, which was the date set for the trial of the Petitioner, the Petitioner made a motion to admit as one of his counsel James M. Long. Since the question of the admission of Mr. Long was objected to by the District Attorney, an extensive inquiry was made by the trial court into the matter and it was determined that Mr. Long, at that time, was the chief prosecuting attorney for the Fifteenth Judicial Circuit in South Carolina, which included Horry County, where Myrtle Beach is located, and where the Petitioner himself lived. At this time, the law of South Carolina, as provided in Section 1-255 of the Code of Laws of South Carolina stated as follows:

"The solicitors may defend any persons brought to trial before any criminal courts of the state when their duty shall not require them to prosecute such persons and their assistance shall not be required against such persons by the Governor or Attorney General."

During the inquiry into this question, the District Attorney told the trial court that Mr. Long had originally been requested to assist him in the arrest of the Petitioner but that no help was forthcoming and that Mr. Long in fact assisted the Petitioner in making bond on the murder charge.

Subsequent to the retaining of Mr. Long as counsel for the Petitioner, additional criminal charges were brought against the Petitioner in Mr. Long's judicial district. The Attorney General of South Carolina, responding to this situation, filed a writ in the Supreme Court of South Carolina to restrain Mr. Long from participating in South Carolina in any of the cases involving the Petitioner. However, after Mr. Long explained that his assistants were handling the prosecution in South Carolina and that he was completely removed from that prosecution, the matter was withdrawn by the Attorney General. It should be pointed out that at the time of the motion to allow Mr. Long to appear in the criminal action in Union County, North Carolina, the question of the prosecution by Mr. Long or his assistants in South Carolina was still before the South Carolina Supreme Court.

Upon the conclusion of the inquiry into the matter of the Petitioner's legal representation, the trial court issued the following findings of fact:

"That a bill of indictment was issued against the defendant Harry Hunter on or about May 5, 1975; that Mr. James E. Griffin of the Union County Bar was employed by Mr. Hunter approximately June 1, 1975; that prior to that time the defendant had employed Mr. James M. Long, and prior to that time had employed Mr. Stroman; that Mr. J. M. Long is the duly elected solicitor or prosecuting attorney for the Fifteenth Judicial Circuit in South Carolina, consisting of

Horry and Georgetown Counties; that since the issuance of the bill of indictment from Union County the defendant has been indicted in the Fifteenth Judicial Circuit of South Carolina for a felony; that Mr. Long has obtained permission from the proper authorities in South Carolina to not prosecute the defendant in South Carolina, but to leave it to his assistants and the Attorney General's Office of the State of South Carolina."

Based on the findings of fact as herein set out, the trial court concluded that:

"The Court in its discretion denies the written motion of Mr. Long to appear in the trial of this case in Union County; there being no objection to Mr. Stroman appearing, the Court will allow him to appear in behalf of the defendant."

Mr. James Griffin, who was retained by the Petitioner as counsel in this case on June 1, 1975, was told on or about that date by the District Attorney of Union County that an objection would be made to the appearance of Mr. Long as legal counsel for the Petitioner. However, subsequent to the denial of Mr. Long's written motion by the trial court to appear as counsel in this case, Mr. Griffin moved that the trial of the Petitioner be continued "to allow Mr. Hunter to obtain other counsel if he so desires." No further statement or argument in the Petitioner's behalf was made at this time for the continuance. The motion for the continuance was denied by the trial court

ARGUMENT

DOES A DEFENDANT WHO IS BEING TRIED IN A CRIMINAL ACTION IN ONE STATE, THOUGH HE BE A RESIDENT OF ANOTHER STATE, HAVE AN AUTOMATIC CONSTITUTIONAL RIGHT TO BE REPRESENTED IN THE CRIMINAL ACTION BY AN ATTORNEY FROM HIS STATE OF RESIDENCE, EVEN THOUGH THE

DEFENDANT IS ALREADY REPRESENTED BY ONE ATTORNEY FROM HIS STATE OF RESIDENCE AS WELL AS AN ATTORNEY FROM THE STATE IN WHICH THE CRIMINAL ACTION IS BEING CONDUCTED?

The Petitioner argues that his constitutional right to counsel was violated by the North Carolina Superior Court when it denied the written motion of Mr. James Long, a South Carolina attorney employed by the Petitioner, to legally represent him against criminal charges brought in Union County, North Carolina. The only case which the Petitioner has cited in support of his argument is *United States v. Bergama, et al*, 154 F.2d. 31 (1946). None of the other cases which are cited by the Petitioner involve in any way the exclusion of an out-of-state attorney. In *United States v. Bergama, supra*, the Circuit Court of Appeals for the Third Circuit held that it was error for a Federal District Court to exclude from the trial, which was taking place in Pennsylvania, New Jersey attorneys who were chosen and retained by a New Jersey resident. However, in *United States v. Bergamo, supra*, it was suggested by the Court that a primary reason for its decision was that local counsel did not have sufficient time to prepare an adequate defense for the defendants, an argument which was made by the local counsel to the Court when it decided not to put on any active defense for the defendants. It is also apparent from a careful reading of *United States v. Bergamo, supra*, that the local Pennsylvania counsel, employed by the defendants, was to be in the nature of associate counsel and not lead counsel. Lead counsel was to come from New Jersey, the resident state of the defendants. Also, the trial court announced that only Pennsylvania counsel from that district would be allowed to practice before the court.

United States v Bergamo, supra, is clearly distinguishable on its facts from the present case. In this case, it is apparent that Mr. James Griffin, the North Carolina attorney, was to act as lead counsel and not as associate counsel. It is equally clear that in this case, unlike *United States v. Bergamo, supra*, the Petitioner was in fact allowed to have South Carolina legal representation. There was no attempt by the trial court to arbitrarily deny to the petitioner legal counsel from another state. No blanket suggestion was made by the North Carolina

trial court that all legal counsel, outside North Carolina, would be excluded. On the contrary, the North Carolina trial court specifically allowed legal representation from outside North Carolina.

It is equally important to note that trial counsel in this case had sufficient time to prepare a defense for the Petitioner. The South Carolina counsel who was retained in this case was employed by the Petitioner prior to May 5, 1975. The North Carolina counsel was employed on or about June 1, 1975. The trial of the Petitioner did not begin until August 18, 1975, some two and one-half months after North Carolina counsel had first been retained.

In addition, after the exhaustive inquiry by the North Carolina trial court into the merits of allowing Mr. James Long, the South Carolina attorney, into the case, the trial court made findings of fact to support his discretionary ruling to exclude Mr. Long from the trial of the case. As noted by the North Carolina Supreme Court's opinion, Subsection 6 of G.S. 84-4.1 provides that compliance with the requirements that must be met by out-of-state attorneys in North Carolina shall not deprive the trial court of the discretionary power to allow or reject the application. That such allowance of outside counsel has long been discretionary in North Carolina is made clear by the Supreme Court decision of *Manning v. Railroad*, 122 NC 824, 28 SE 963 (1898) wherein the Court stated as follows:

> "The appearance of such counsel is a matter of courtesy in each and every case, and on motion in each case, and only for the occasion on which it is allowed. The statute forbids the courts from allowing non-resident counsel (when citizens of another state and not holding license from this court) from practicing habitually in our courts, and they cannot acquire the right to do so."

The North Carolina Supreme Court, in *State v. Hunter, supra*, perhaps best cited the prevailing and established law throughout the United States with respect to this question of the right to practice law by an out-of-State attorney in the following paragraph which is quoted in its entirety:

> "It is well settled that an out-of-state attorney has no absolute right to practice law in another forum. It is permissive and subject to the sound discretion of the Court. *Thomas v. Cassidy*, 249 F. 2d 91 (4th Cir. 1957), *cert. denied*, 355 U.S. 958, 78 S.Ct. 544, 2 L.Ed. 2d 533 (1958); *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950); *Parker v. Parker*, 97 So.2d 136 (Fla. App. 1957); *State v. Kavanaugh*, 52 N.J. 7, 243, A.2d 225 (1968), *cert. denied*, 393 U.S. 924, 89 S.Ct. 254, 21 L.Ed.2d 259 (1968); *Manning v. Railroad*, 122 N.C. 824, 28 S.E. 963 (1898); *Smith v Brock*, 532 P.2d 843 (Okl. 1975); 7 Am Jr. 2d, Attorneys at Law, §10 (1963 and Cum. Supp. June, 1976); 7 C.J.S. Attorney and Client §15(b) (1937 and Cum Supp. 1976)."

In addition, the Supreme Court of Oklahoma has recently examined this same contention in a similar situation in *Smith v. Brock*, 532 P.2d 843 (1975). In this action, petitioners (defendant and his out-of-state attorney) requested the Oklahoma Supreme Court to assume original jurisdiction and issue a writ of *mandamus* compelling the trial court to admit the attorney *pro hac vice* to defend petitioner.

Pursuant to constitutional authority, the Supreme Court of Oklahoma promulgates rules governing the practice of law in that State, Sec. 5 of Art. 2 in Title 5, OS 1971, Ch. 1, App. 1 contains a provision analogous to G.S. 84-4.1. In order for attorneys from other jurisdictions to practice in Oklahoma, certain express conditions must be met. This case concerned a subsection regarding foreign attorneys who have willfully engaged in disorderly or disruptive tactics–petitioner had been refused admission to practice in the trial court based on previous convictions both in Oklahoma and Texas for contempt of court.

The Oklahoma court examined cases in several other jurisdictions that construed similar questions. In Florida, an appellate court has held, "The right of an attorney of another state to practice is permissive and subject to the sound discretion of the Court to which he applied for the permission."

Parker v. Parker, 97 So.2d 136, 137 (1957). In *State v. Kavanaugh*, 52 NJ 7, 243 A2d 225 (1968), the Supreme Court of New Jersey rejected Mr. F. Lee Bailey's contention that there is a constitutional right to select an attorney who is not a member of the New Jersey Bar. This decision was bottomed on *Thomas v. Cassidy*, 249 F2d 91 (4th Cir. 1957); *Cert. den, Fitzgerald v. Cassidy*, 355 US 958, 78 SCt. 544, 2 L.Ed. 2d 533 (1958), and the following language from that case is cited with approval:

> "'It is well settled that permission to a nonresident attorney, who has not been admitted to practice in a court, to appear *pro hac vice* in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge. 5 Am Jur. p.572; *Manning v. Roanoke & T.R.Co.*, 122 NC 824, 28 SE 963; *Youmans v. Hannah*, 35 ND 479, 160 NW 705, 161 NW 797, Ann.Cas. 1917 E. 263; Note 24 LRA, NS, 754." *Smith v. Brock*, *supra*, at 848.

To the same effect is *State v. Ross*, 36 Ohio App. 185, 304 NE2d 396 (1971).

After establishing that the admission of an out-of-sate lawyer rests within the sound discretion of the trial court, the Oklahoma Supreme Court then considered the question of whether there is a constitutional right of an accused to select out-of-state counsel of his own choice, the very issue presented here. The Oklahoma Supreme Court's analysis quotes with approval the following statement made in *Cooper, et al v. Hutchinson*, 184 F2d 119 (3rd Cir. 1950):

> "'The narrower question here is the extent to which an accused persons choice of counsel is a constitutional right. The argument insists that there is a constitutional right, at least in a capital case, to whatever counsel an accused person pleases to have. *If that counsel is not a member of the Bar of the state where the prosecution is being conducted, still, the argument runs, the accused may effectively choose him just as freely*

as he could choose a lawyer admitted to practice locally. The person chosen by the accused may then insist upon conducting the defense in the local courts. *Control by the states over the persons who may be licensed to practice law in their courts would thus be greatly diminished in every capital criminal prosecution where the accused desires counsel from somewhere else.*

The length to which this argument takes one is startling. It has always been thought that the license to practice law is limited, except as a matter of grace, to persons who had fulfilled the local requirements for practice. ....' (*Emphasis added.*)" *Smith v. Brock*, supra, at 850.

Finally, the United States Court of Appeals for the Sixth Circuit in *Ross v. Reda, Judge*, 510 F.2d. 1172, *cert. denied*, 75-63 (October 14, 1975), issued a per curiam decision affirming the denial of the application of the petitioner for a writ of habeas corpus, wherein it was contended that the refusal of the Ohio state trial court to admit out-of-state counsel to represent the petitioner at his trial in that court deprived the petitioner of his Sixth amendment right to counsel. In making its determination, the Court of Appeals stated as follows:

"While the Sixth Amendment right '(i)n all criminal prosecutions' to the 'assistance of counsel' implies a degree of freedom to be represented by counsel of defendant's choice, this guarantee does not grant the unconditional right to representation in a state court by a particular out-of-state attorney. To the contrary, in *Thomas v. Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied*, 355 U.S. 958 (1958), the Court said:

"'(I)t is well settled that permission to a non-resident attorney, who has not been admitted to practice in a court to appear *pro hac vice* in a case there pending is not a right by a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge.'

"Moreover, the Sixth Amendment claim is modified significantly by the actual availability and presence of other competent counsel.

"...The prerogative of a trial judge to exclude out-of-state counsel, like the right of a defendant to be represented by the counsel of his choice, is not an absolute right. In the present case the state trial court denied the application of the out-of-state attorney for admission *pro hac vice* on the ground that he affirmatively refused to limit his out-of-court statements about the case during its pendency. In his order the trial judge noted, among other reasons for denying the application, the following:

"'(B)ut there is no question in the mind of this Court that the applicant's conduct was unprofessional and in violation of the Code of Professional Responsibility, particularly Canon 7, EC 7-36, DR 7-107 (A) (B); Canon 8, DR 8-102 (B); Canon 9, EC 9-1, 2, 6.'

"The Ohio Court of Appeals held that the refusal of the out-of-state counsel to limit his out-of-court statements about the case during its pendency constituted a potential violation of Canon 7 of the Ohio Canons of Ethics.

"We view this justification as sufficient to warrant the legitimate exercise of the state's power to 'require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar ...' *Schware v. Board of Bar Examiners*, 353 US 232, 239 (1957). The states necessarily maintain this power over the admission of attorneys as an 'incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied.' *Cohen v. Hurley*, 366 US 117, 123-24 (1961); *State v. Kavenaugh*, 52 NJ 7, 243 A.2d 225, *cert denied*, 393 US 924 (1968)."

It is clear from the decision of *Ross v. Reda, Judge, Supra, Thomas v. Cassidy, supra,* and *Cooper v. Hutchinson, supra*, that at least three circuit courts have ruled on the precise question presented here, and all three circuit courts have ruled the same way. There is no conflict of opinion at this time among the various circuit courts of appeals as to the question of out-of-state legal representation in a criminal trial under facts imilar to what are present here.

Petitioner makes the argument that the decision of the North Carolina Supreme Court is incompatible with previous decisions of the United States Supreme Court. However, as the Petitioner points out, there are no present decisions of the United States Supreme Court specifically relating to the exclusion of an attorney such as was done in the instant case. There are, as have been mentioned above, several decisions throughout the United States construing such a situation and all of them have resolved the matter in favor of the position taken by the Respondent. The decision of the North Carolina Supreme Court is in no way incompatible with previous decisions of the United States Supreme Court and in no way violates the Petitioner's right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

In the decision of the United States Court of Appeals in *Ross v. Reda, Judge, supra*, it was stated that a trial judge did have the discretion to exclude out-of-state counsel, provided of course that there was some legitimate reason for so doing. In the instant case, the attorney from South Carolina who was excluded by the North Carolina trial court refused to assist the Union County District Attorney in originally apprehending the Petitioner and in fact assisted the Petitioner in making bond on the murder charge Secondly, the South Carolina Supreme Court, at the time the motion was made to allow Mr. Long to be associated as counsel in the North Carolina trial, had not yet made its final determination as to how to proceed with certain charges which were brought against the Petitioner in South Carolina in the very geographical location and judicial circuit wherein Mr. Long was the chief prosecutor. Because of these factual situations, the North Carolina trial court, in its legitimate discretion, exercised its prerogative to deny Mr. Long, the South Carolina attorney, from actively participating in the North Carolina trial. In so doing, the North Carolina

trial court sought to insure compliance with the Code of Professional Responsibility of the North Carolina State Bar wherein Canon 9 states as follows:

> "A lawyer should avoid even the appearance of professional impropriety."

In addition, it should finally be pointed out that the North Carolina trial court did not disallow to the Petitioner the right to have counsel from outside North Carolina. Indeed, the Petitioner specifically was allowed to have a South Carolina attorney representing him at the trial as well as a North Carolina attorney, who was to act as lead counsel.

The Petitioner argues that the trial court committed error by dening to him a continuance of the August 18, 1975, trial in order to allow him the opportunity to select other outside counsel. However, it is noted that counsel for the Petitioner did not argue his Motion for Continuance. The Petitioner now states that he did not do so because he was completly convinced that he would prevail However, the fact remains that no argument was made whatsoever to the trial court in support of the Motion for Continuance. No showing was made that the Petitioner desired to have other counsel from South Carolina.

Finally, the District Attorney of Union County specifically instructed the North Carolina counsel for the Petitioner two and one-half months prior to the trial date that he would oppose allowing Mr. Long to participate actively in the trial. While Respondent recognizes that a decision of the District Attorney is not the final factor in a question such as this, and that only the trial court itself can make that conclusion, it did nevertheless put the Petitioner and his counsel on active notice that there was a serious possibility that Mr. Long might not be allowed to participate in the trial since the District Attorney would actively oppose that. The Petitioner and his counsel had two and one-half months to prepare an argument in support of his Motion for Continuance or in any event to seek other counsel should that necessity arise. There is no indication that any such attempt was made. There is no indication that had a continuance been granted, that Petitioner would have ever sought any additional outside counsel.

In conclusion, it is apparent that the decision of the North Carolina Supreme Court in this matter is correct and proper and completely in accord with prevailing law throughout the United States, both in State and Federal Courts. The Petitioner was not denied his right to counsel and was not denied his right to a fair trial. The Petitioner was afforded both North Carolina counsel and counsel from his resident state. The action of the North Carolina trial court in dening to Petitioner the right to have Mr. Long represent him in the criminal trial in North Carolina was completely within the legitimate discretion of the trial court and was so properly exercised. There was no error committed by the trial court in this regard and none was shown on appeal. For that reason, the North Carolina Supreme Court acted correctly in affirming the judgment of the North Carolina trial court in this regard.

CONCLUSION

Respondent urges that the decision of the North Carolina Supreme Court affirming the action of the North Carolina Superior Court was correct and that no constitutional right to counsel of the Petitioner was denied. Therefore, the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify ~~that I am admitted to practice law before the Supreme Court of the United States~~; that I have served copies of the within RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA by depositing three copies of same in the United States Mail at Raleigh, North Carolina addressed to:

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first class postage prepaid.

This the 14th day of January, 1977.

James Blackburn
James L. Blackburn
Special Deputy Attorney General

Counsel for the State of North Carolina, Respondent